Supreme Court, U.S.
FILED
OCT 14 1993
OFFICE OF THE CLERK

No. 93-425

In The

Supreme Court of the United States

October Term, 1993

MUTUAL OF OMAHA LIFE INSURANCE COMPANY,

Petitioner,

v.

MARY P. DAHL-EIMERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Federal Court of Appeals properly exercises jurisdiction in an appeal which is not moot, and even if it otherwise would have been moot, addresses an order which could control further litigation between the parties and involves a dispute that is capable of repetition yet evading review?

2. Whether this case presents jurisdictional questions requiring an exercise of this Court's supervisory powers?

LIST OF PARTIES

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The Respondent, Mary P. Dahl-Eimers ("Mary Dahl-Eimers"), respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

Unlike the typical situation where undisputed factual material is presented to this Court with respect to a

mootness issue, the Respondent Mary Dahl-Eimers contests many of the facts set forth in Defendant's petition.[1] Furthermore, Defendant's petition fails to inform this Court that Mary Dahl-Eimers' disease again became active in August. Consequently, pursuant to Supreme Court Rule 15.1, Mary Dahl-Eimers includes this Statement of the Case.

Mary Dahl-Eimers suffers from metastatic breast cancer. The Defendant, Mary Dahl-Eimers' health insurer, refused to pay for the only treatment that offers her a chance of long-term, disease-free survival: high dose chemotherapy with autologous bone marrow transplant, or "HDC-ABMT." The Defendant then led the district court into error, and by doing so prevented Mary Dahl-Eimers from receiving the HDC-ABMT treatment at the time her oncologists initially recommended she receive it.

Defendant's petition creates the misleading impression that HDC-ABMT is limited to tests in "medical research facilities" (Petition at p. 3). Defendant's own expert testified in deposition that HDC-ABMT is offered in community hospitals as well as specialized cancer treatment facilities (Herberman dep. at 92).

In a comprehensive 1992 medical article, leading oncologists surveyed the results of numerous high-dose programs (including programs using the ICE protocol) and concluded "these currently available published trials have now documented that dose intensive chemotherapy with hematopoietic auto transplantation is an effective

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[1] Stern, Gressman, Shapiro, *Supreme Court Practice*, § 18.4 at p. 722 (B.N.A. 6th Ed. 1986).

treatment for metastatic breast cancer." Antman, et al., *"Dose Intensive Therapy in Breast Cancer"*, **Bone Marrow Transplantation (Suppl.)** 10: 67, 69 (1992).

Defendant quotes from the district court opinion where that court reached the "inescapable conclusion" that HDC-ABMT for metastatic (or Stage IV) breast cancer is experimental (Petition at pp. 4-5). Of course, that opinion was vacated by the Eleventh Circuit because the district court had erred as a matter of law in failing to recognize the ambiguity in the terms "experimental" and "considered experimental" which Defendant used in its policy. As the Eleventh Circuit opinion suggests, the vast majority of cases addressing "experimental" policy language find HDC-ABMT is not experimental for appropriate breast cancer patients.

Defendant's discussion of the development in Plaintiff's disease contains several significant misstatements and omissions. Defendant neglects to mention the reason Mary Dahl-Eimers sought alternative treatments in January, 1993, was to enable her to survive during the appellate litigation so she would be alive to receive HDC-ABMT. (R. Eimers dep. at 7-8). She had requested the Defendant pay for HDC-ABMT at the University of Alabama in the fall of 1992 (after it had denied the treatment at Moffitt and while the case was on appeal) and Defendant refused.[2]

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[2] To the extent Defendant focuses on the particular protocol at Moffitt, this argument is disingenuous as the Defendant was challenged in oral argument before the Eleventh Circuit to identify any institution for which it would have paid for HDC-ABMT for breast cancer and failed to do so (*see* p. 6 of Plaintiff's Eleventh Circuit memo dated May 7, 1993).

Defendant's assertion that it is not medically possible to predict what will happen to Mary Dahl-Eimers' condition is contradicted by the evidence, including that of its own expert. Defendant's statement that there is no way to know if Mary Dahl-Eimers' disease will become active again is wrong (Petition at p. 8). Defendant's expert admitted in deposition that Stage IV cancer was incurrable with only low dose therapy, and that Mary Dahl-Eimers would relapse and die (Herberman dep. at p. 34).

Defendant cites the affidavit of Herberman, which it filed in the Eleventh Circuit, but ignores the affidavit from Dr. Roy Jones filed on behalf of Mary Dahl-Eimers. Unlike Herberman who is an administrator and not a practicing doctor, Dr. Jones is a board certified clinical oncologist, who has personally treated over 400 patients with HDC-ABMT during the last ten years (Herberman dep. at 138; Jones Aff. of May 5, 1993 at ¶¶ 1, 2).

Dr. Jones testified that Mary Dahl-Eimers' cancer will become more active in the future and at that time was likely to become even more aggressive than it had been in the past (Jones Aff. at ¶ 7). Dr. Jones stated that at the time her cancer becomes more active, HDC-ABMT is the only treatment available which will offer her a chance of long-term, disease-free survival and that based on the expected time frame for her cancer becoming more active, it was not reasonable to expect a better treatment to be available than HDC-ABMT (Jones Aff. at ¶ 8).

Defendant fails to mention that on September 14, 1993, Mary Dahl-Eimers filed an affidavit in district court stating that (1) her August 5, 1993 CAT scan showed

significant active cancer in her liver, (2) she was undergoing Taxol chemotherapy, and (3) in three to five months upon the completion of that chemotherapy, it was her intention to seek HDC-ABMT at a cancer center in the United States (Dahl-Eimers' affidavit filed in district court September 14, 1993). Defendant knew of the active cancer before the affidavit, and agreed to pay for Taxol treatments in its August 18, 1993 letter.

Thus, contrary to the claims of Defendant, Mary Dahl-Eimers has experienced a recurrence of active cancer. The fundamental "medical" premise for Defendant's mootness argument in the Eleventh Circuit, and before this Court, has been proven incorrect.

Defendant also omits a portion of the procedural history of the Eleventh Circuit appeal. The Eleventh Circuit issued its opinion on March 9, 1993. By its motion dated March 29, 1993 and filed with the Eleventh Circuit the following day, Defendant requested the court to stay its mandate based on the representation that Defendant intended to seek review in this Court by writ of certiorari with respect to the Eleventh Circuit's substantive holding that the term "experimental" was ambiguous, asserting the issue is "one of importance to the insurance industry." Defendant never sought certiorari review on the merits.

Richard Eimers' affidavit demonstrates that he did not speak with Dr. Vaughan until March 30, 1993 (R. Eimers Aff. ¶ 2). Richard Eimers testified they had consulted with three doctors in a three-day period (and this call with Dr. Vaughan was one of the three) (R. Eimers dep. at 16). Richard Eimers agreed that based on the

consensus of the three physicians, "ultimately" their decision had been to wait until they saw more active disease (R. Eimers dep. at 16).

Thus, Defendant's assertion at p. 8 of the petition that Mary Dahl-Eimers had no intent or desire to undergo the HDC-ABMT as of February 10, 1993 is wrong. The conversation with Dr. Vaughan did not even occur until March 30, 21 days after the opinion (the time for the issuance of the mandate, but for the Defendant's motion to stay the mandate to allow it to seek review of the merits by certiorari). Contrary to Defendant's representation to the Eleventh Circuit, the Defendant never sought substantive review of the correctness of the Eleventh Circuit's decision. Instead, it deposed Mary Dahl-Eimers and her husband, Richard Eimers, in the district court action and then moved to vacate in the Eleventh Circuit (all of which occurred after the time the mandate would have issued if Defendant had not filed its motion claiming that it intended to seek merits review of the March 9 opinion before this Court).

As included in Defendant's Supplemental Brief to this Court, on September 21, 1993, the district court issued an opinion holding the case was non-justiciable in the district court, and dismissing the case. Inexplicably, the order did not refer to Mary Dahl-Eimers' affidavit, filed a week earlier, which demonstrated active disease. The district court went on to opine that, despite the Eleventh Circuit opinion, it would find a Phase 1 protocol for HDC-ABMT experimental. It so held without any further hearing and even though it had no additional evidence on this issue before it than it had when it issued its initial opinion, which the Eleventh Circuit reversed.

Mary Dahl-Eimers has filed a motion for rehearing, and if rehearing is not granted, the order is appealable pursuant to 28 U.S.C. § 1291.

REASONS FOR NOT GRANTING THE WRIT

I. The Eleventh Circuit properly exercised jurisdiction in the appeal which was not rendered moot, and even if it otherwise would have been moot, addressed an order which could control further litigation between the parties and involved a dispute that is capable of repetition yet evading review.

After the Eleventh Circuit had authored its opinion in her favor, Defendant sought to deny Mary Dahl-Eimers the benefit of that opinion at the time her disease becomes more active: an opinion which corrected the district court's erroneous analysis that had required Mary Dahl-Eimers to wait past the time her oncologists initially recommended the potentially life saving treatment.

Before discussing the merits, Mary Dahl-Eimers notes that Defendant's wording of the issues does not comport with the facts, as demonstrated by the Statement of the Case. Contrary to Defendant's suggestion, the alleged "changed circumstances" (from seeking HDC-ABMT as soon as possible to when the disease became more active) did not occur in advance of the panel's opinion. At the time of the panel's opinion, Mary Dahl-Eimers and her husband had not yet consulted about this with her physicians. The conversation with Dr. Vaughan did not even occur until March 30, 1993.

Moreover, the alleged change in Mary Dahl-Eimers' medical condition did not render this case moot for several reasons. Mary Dahl-Eimers' pleadings continued to seek a declaration of her right to obtain the treatment, a permanent injunction, and damages for Defendant's refusal to pay for costs associated with HDC-ABMT which she had incurred.[3] As Dr. Jones predicted, she suffered a relapse and presently has active disease. As the Eleventh Circuit recognized in its August 10, 1993 denial of Defendant's motion, whether or not the terms "experimental" and "considered experimental" are ambiguous in Defendant's policy remain controlling questions of law with respect to Mary Dahl-Eimers' right to obtain HDC-ABMT, which the facts show she will need in the near future if she is to survive.

Mary Dahl-Eimers' case presents unique legal issues and unsettled and changing facts (over which there is a substantial conflict between the parties). This Court has generally indicated questions of fact do not merit review. *See, e.g., National Labor Relations Board v. Hendricks Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

A. The Eleventh Circuit had jurisdiction to address the question of whether Defendant's policy is ambiguous.

Mary Dahl-Eimers' situation differs substantially from the cases on which Defendant seeks to rely. In *Clark*

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[3] For example, *see* the Amended Complaint at ¶ 11 and Richard Eimers' affidavit of May 5, 1993, which states Defendant refused to pay for the cost of Mary Dahl-Eimers' consultation at the University of Alabama in the fall of 1992 in contemplation of receiving HDC-ABMT.

v. K-Mart Corporation, 979 F. 2d 965 (3d Cir. 1992), the defendant's appeal was moot because the plaintiff had already received HDC-ABMT pursuant to the preliminary injunction and the court found it unrebutted that the treatment, once administered, would not be given again. 979 F. 2d at 967. Thus, the situation in *Clark* is the opposite of the situation in *Dahl-Eimers*.[4]

University of Texas v. Camenisch, 451 U.S. 390 (1981), addressed a preliminary injunction which had been granted, and complied with, by the time the appellate court addressed the case. The remaining issues dealt with the bond and who should ultimately bear the cost of an interpreter which had been ordered in the injunction. It was in this context that *Camenisch* made the statements quoted at page 21 of Defendant's petition, that it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits (of course, the Eleventh Circuit did not enter a final judgment, but merely decided a question of law on the ambiguity of Defendant's policy).

Defendant ignores the impact of subsequent decisions of this and the circuit courts, which recognize that, under the type of circumstances here, it is appropriate for the appellate court to address a legal issue – in this case whether the terms "experimental" and "considered experimental" are ambiguous as a matter of law.

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[4] Also, unlike *Dahl-Eimers*, *Clark* was before the appellate court pursuant to 28 U.S.C. § 1292(a), and not 28 U.S.C. § 1292(b) as was the case here.

After citing *Camenisch* and other cases, this Court stated the view set forth therein "is not inflexible." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 756 (1986). This Court discussed several cases where the circuit courts of appeal ruled on the merits while the case was before them on an interlocutory appeal. The Court concluded: "[t]hus, as these cases indicate, if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." 476 U.S. at 757. Here, the question of whether or not the Defendant's policy was ambiguous turned on the policy language, and any factual disputes on other issues did not pertain to that legal issue.

Contrary to Defendant's assertion that the Eleventh Circuit lacked jurisdiction, this Court observed in *Thornburgh* "that a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power." 476 U.S. at 757.

Numerous other cases hold the circuit court has the authority to address such a merits issue while the case is before it on appeal. *See, e.g., Callaway v. Block*, 763 F. 2d 1283, 1287 n.6 (11th Cir. 1985) ("Once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done."); *Mercury Motor Express, Inc. v. Brinke*, 475 F. 2d 1086, 1091 (5th Cir. 1973), (holding the rule that a court of appeals will not consider the merits of the case before it on an interlocutory appeal "is one of orderly judicial administration and not a limit on

jurisdictional power. Once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done.") *See also, Amoco Production Company v. Village of Gambell, Alaska*, 480 U.S. 531, 546 (1987) (citing *Camenisch* and noting the record before the court was complete enough to allow it to decide issues beyond those of preliminary injunction).

Thus, contrary to Defendant's assertions, there is no "limit of jurisdictional power" to hold Defendant's policy is ambiguous as a matter of law. The circuit court "does not lack power to do what plainly ought to be done." What "ought to be done" was for the Eleventh Circuit's opinion to correct the erroneous view of the law Defendant urged on the district court, and permit Mary Dahl-Eimers to continue her fight for her life: against cancer and her insurance company.

These cases demonstrate Defendant's asserted "significant" differences between a trial on the merits and a hearing on a motion for preliminary injunction simply do not exist when there is a legal issue presented as is in this appeal (Petition at 21). As the Eleventh Circuit held in this case, the question presented was a question of contract interpretation which was determined as a matter of law. 986 F. 2d at 1381.

Declaratory judgment actions are appropriate to address insurance coverage issues and the presence of contingencies does not defeat entitlement to declaratory relief under the Declaratory Judgment Act, 28 U.S.C.

§ 2201.[5] This Court held there was a controversy and reversed the dismissal of the declaratory action to determine coverage in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *see also, White v. National Union Fire Insurance Company*, 913 F. 2d 165, 168 (4th Cir. 1990); *Pennsylvania Casualty Co. v. Upchurch*, 139 F. 2d 892 (5th Cir. 1943).

Mary Dahl-Eimers explains below why, even if this case would otherwise be moot, it is capable of repetition yet evading review. However, this Court's precedents demonstrate that federal courts retain jurisdiction over cases in a variety of circumstances when the particular order addressing injunctive relief may no longer be a direct issue between the parties.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the district court had entered a preliminary injunction addressed to layoffs in 1981. On certiorari to this Court, the respondents (original plaintiffs) contended the case was moot because the employees had been restored to their prior positions and the injunction no longer had force or effect. This Court found the mootness argument "untenable" for several reasons. 467 U.S. at 569.

Among those reasons, the opinion noted the respondents had not conceded in urging mootness that the underlying rulings were in error and should be reversed (similarly, Defendant has not admitted that the district court's July, 1992, opinion was in error and should have

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[5] *See, e.g., Browning-Ferris Industries of Alabama, Inc. v. Alabama Department of Environmental Management*, 799 F. 2d 1473, 1478 (11th Cir. 1986).

been reversed). The opinion noted that it was the moving party's burden to convince the Court that the issue "is of no real concern to the City because it will never again contemplate layoffs that if carried out in accordance with the seniority system would violate the modified decree." This Court held that "[f]or this reason alone, the case is not moot." 467 U.S. at 570. Similarly, Defendant has given no assurance that it will never again contend that its exclusion is sufficient to exclude coverage for HDC-ABMT where prescribed by the patient's oncologist.

The opinion identified another reason: the judgment below would have a continuing effect, and there were other monetary claims involved. 467 U.S. at 571.[6] Similarly, Mary Dahl-Eimers will continue her fight for coverage. In addition, her amended complaint sought damages for costs already incurred with respect to HDC-ABMT.

Super Tire Engineering Company v. McCorkle, 416 U.S. 115 (1974), addressed a mootness issue in the context of the denial of a preliminary injunction where the petitioners who sought the injunction relating to public strike funds had returned to work. The district court had denied the injunction and dismissed the complaint. This Court held that, in light of the petitioner's request for declaratory relief, there was a "duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 416 U.S. at 121. Mary Dahl-Eimers presents a much stronger case than in *Super Tire*.

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[6] *Stotts* held "[u]ndoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness." 467 U.S. at 571.

She did not receive the relief sought by the denied preliminary injunction and continued to seek a permanent injunction, declaratory relief and damages.

Super Tire also held there would be jurisdiction, because the case presented an issue "capable of repetition, yet evading review." 416 U.S. at 125. The Court noted the majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. Because of the time involved in the litigation, Mary Dahl-Eimers was denied the treatment in the first window recommended by her oncologists. As discussed below, her situation presents a much stronger case for review under the capable of repetition yet evading review doctrine.

Defendant's discussion of certified questions and orders under 28 U.S.C. § 1292(b) adds nothing to the analysis, particularly when the cases it cites are examined (Petition at 23-26). *United States v. Stanley*, 483 U.S. 669 (1987), and most of the other cases Defendant cites stand for the proposition that the appellate court should address issues related to the order which is before it, and not issues decided in the case under earlier orders. Here, all of the matters discussed in the Eleventh Circuit opinion pertained to the district court's July, 1992, order.

Ivy Club v. Edwards, 943 F. 2d 270 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992), considered whether the appeal from an injunction had become moot if the enjoined party had voluntarily decided to change the policy which had been enjoined. 943 F. 2d at 276. The Third Circuit found that it did not have to resolve that

question because other factors gave life to the controversy, including a monetary damage award involved in the case. Similarly, Mary Dahl-Eimers made a claim for monetary damages. As *Ivy* (and this Court in *Stotts*) held, that is sufficient.

Defendant's argument that the appeal became moot when Mary Dahl-Eimers withdrew her request for a preliminary injunction contains another major fallacy. It assumes that withdrawing her motion would have somehow eliminated the adverse order the district court entered in July, 1992. If Mary Dahl-Eimers had not appealed at all, but had filed a withdrawal of her preliminary injunction request after the order, would Defendant concede that the July order was of no effect as to rights between the parties? Of course not – it would have urged that order as collateral estoppel in any further proceedings. Indeed, even in urging the Eleventh Circuit and this Court to vacate the Eleventh Circuit opinion, Defendant has never said the district court opinion should also be vacated.

Powell v. McCormack, 395 U.S. 486 (1969), involved a suit by representative Adam Clayton Powell to enjoin the 90th Congress from refusing to seat him, and seeking declaratory relief and a claim for the salary which he was denied. The respondents urged mootness after the 90th Congress terminated and Powell was seated as a member of the 91st Congress. This Court held the case was not moot, observing that Powell had not been paid his salary by virtue of an allegedly unconstitutional resolution and that his claim for declaratory relief remained pending. The Defendant did not agree to pay for Mary Dahl-Eimers' HDC-ABMT, and her claims for declaratory relief

and damages remained pending until after the mandate issued, and long after the time had passed for Defendant to seek certiorari review of the merits.

Thus, *Powell* recognizes another exception to the mootness doctrine "where the trial court's order will have possible collateral legal consequences." *B & B Chemical Company, Inc. v. United States Environmental Protection Agency*, 806 F. 2d 987, 990 (11th Cir. 1986) (additional cites omitted). Absent the Eleventh Circuit's correction of the erroneous district court ruling, Mary Dahl-Eimers would have been faced with the Defendant's argument that its policy language was not ambiguous and that the proposed HDC-ABMT treatment (at least for a Phase 1 ICE protocol at Moffitt) was experimental.

B. Mary Dahl-Eimers' need for HDC-ABMT is capable of repetition yet evading review.

It is ironic that Defendant contends the predicament Mary Dahl-Eimers faces is not capable of repetition yet evading review. Ironic because Defendant placed her in this position by wrongfully delaying her receipt of the HDC-ABMT treatment when her oncologists initially recommended it. Ironic because everyone knew her cancer and need for treatment was not only capable of repetition, but certain of repetition.

Defendant cites but ignores the holding of this Court's recent decision in *Honig v. Doe*, 484 U.S. 592

(1988).[7] *Honig v. Doe* holds the standard for "capable of repetition" is whether there is a "reasonable expectation" the party will face the situation again. 484 U.S. at 318. This standard is met by controversies "based on expectations that, while reasonable, were hardly demonstrated probable." 484 U.S. at 318 n.6.

Honig v. Doe addressed a plaintiff's claim against a school district under a federal statute which protected him for his disability. The Court held his case was not moot even though (1) he was 20 and the statute only applied to disabled children between the ages of 3 and 21, (2) he did not face any current proceedings addressed by the statute, and (3) he no longer resided in the school district where he had encountered difficulties. 484 U.S. at 318.

Defendant has failed to show that there is less than a "reasonable expectation" that Mary Dahl-Eimers will need HDC-ABMT in the future. The evidence demonstrates it is much more than probable that Mary Dahl-Eimers' cancer will strengthen and she will need high

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[7] Some "mootness" cases Defendant cites actually held the case not moot, like *Honig v. Doe* and *Steffel v. Thompson*, 415 U.S. 452 (1974). Those finding mootness are clearly distinguishable. For example, *Honig v. Students of California School for the Blind*, 471 U.S. 148 (1985), held a preliminary injunction was moot where the enjoined party had conducted the testing required by the injunction. *Weinstein v. Bradford*, 423 U.S. 147 (1975), held a prisoner's suit regarding parole rights was moot where he had been completely released from supervision. Mary Dahl-Eimers has not received the treatment (unlike the testing in *Honig v. Students*) and has not been "released" from her cancer (unlike *Weinstein*).

dose treatment (her affidavit shows this has occurred). Thus, she more than meets this standard which does not even require that the likelihood of repetition be "demonstrated probable."

Mary Dahl-Eimers is virtually certain to be subject to the same action again. Defendant has not indicated that it will pay for her HDC-ABMT. The "factual contingencies" Defendant asserts are, as Defendant well knows, inaccurate; even if they existed, Mary Dahl-Eimers would still meet the "capable of repetition" test.

Contrary to Defendant's position, "the course of Plaintiff's health" is not in doubt (Petition at p. 17). The unanimous medical opinion in this case established that Mary Dahl-Eimers' cancer would again attack her (even Defendant's expert administrator does not contend she is free of cancer; Herberman Aff. ¶ 16) (her affidavit shows this has occurred). HDC-ABMT is her only hope of long-term survival. Dr. Jones and Mary Dahl-Eimers' oncologists testified her cancer would become more active and "[b]ased on the expected time frame for her cancer becoming more active, it is not reasonable to expect a better treatment to be available than HDC-ABMT" (Jones Aff. at ¶ 8).

Defendant's argument on this point is particularly disingenuous. Contrary to the citation to Herberman affidavit at ¶ 16, that affidavit did not say that Plaintiff's medical condition in the future "is absolutely unpredictable" (Petition at p. 18). It said Mary Dahl-Eimers may remain symptom-free for some period of time. It did not say she is free from cancer. Indeed, as the Defendant knew at the time it filed its petition, Mary Dahl-Eimers

had experienced active cancer in August, 1993, and was obtaining Taxol treatments which Defendant had agreed to pay for under its letter of August 18, 1993. Thus, for Defendant to suggest that Mary Dahl-Eimers' medical condition is "absolutely unpredictable" when it knows that her cancer has become active is inexcusable.

Defendant's speculation that the policy terms might change is simply that – speculation, and does not rise to the level necessary to preclude review. As the Eleventh Circuit noted, the Defendant did not inform that court (and does not inform this Court) of any change in the contractual language (August 10, 1993 order). Indeed, any effort to change the contractual language at this point in an effort to deny Mary Dahl-Eimers coverage for a treatment she would have received under the present contract language, but for Defendant's wrongful denial, would visit bad faith and other legal issues upon the Defendant.

Defendant asserts the selection of the place of treatment and the precise mix of drugs in the HDC-ABMT treatment are factors which make this case moot. Contrary to the Defendant's unsupported assertion that the particular regimen is an important factor to evaluating the dispute, the Defendant only makes an issue of the regimen and protocol when it serves the Defendant's purposes.

As the district court opinion in this case demonstrates, the approach of attacking the particular ICE protocol at Moffitt was a key to Defendant's initial success. However, Defendant subsequently refused to pay for a

different HDC treatment when requested at the University of Alabama, and has not disputed that its standard practice is to deny request for HDC-ABMT for breast cancer at any institution under any protocol. In *Harris v. Mutual of Omaha Companies,* S.D. Ind. Case No. IP 92-1089-C (August 26, 1992), 1992 WL 421489, *affirmed,* 992 F. 2d 706 (7th Cir. 1993), Defendant was represented by the same counsel and prevailed (under a policy with more specific exclusions). In *Harris,* Defendant sought to rely on the district court's decision in *Dahl-Eimers,* even though the high dose combination of drugs was different (*see Harris* at p. 32, n.13).

Defendant only seeks to distinguish between different HDC treatments when it is expedient for the Defendant. As the amici pointed out in the Eleventh Circuit appeal in this case, low dose cancer therapies involve different drugs, regimens of drugs, and doses. Medical insurers routinely pay for these and do not try to dictate drug regimens or doses in low dose cancer treatments. They properly defer to the patient's treating oncologist. The perceived difference in cost of the high dose therapy accounts for the Defendant's desire to interject itself into the doctor-patient relationship by dictating treatment.[8] Thus, the Defendant's emphasis on the particular regimen should be seen for what it is – a litigation tactic – and not as a "factual contingency" that moots any case.

Finally, Defendant suggests that research efforts may find something better than HDC-ABMT for metastatic

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[8] The cost for a successful high dose therapy can be less than the low dose alternative with related costs of supportive care.

breast cancer. This ignores Dr. Jones' May, 1993, affidavit that "based on the expected time frame for her cancer becoming more active, it is not reasonable to expect a better treatment to be available than HDC-ABMT." (Jones Aff. ¶ 8). As noted, her disease has now recurred and Defendant suggests no treatment which has superseded the HDC-ABMT she will soon need.

Defendant asserts that, when her disease recurs, there would be adequate time for Mary Dahl-Eimers to seek "meaningful and complete judicial review" (Petition at p. 16). In a perfect world she should be able to obtain speedy relief because Defendant should promptly lose on the merits in light of its ambiguous policy and the overwhelming case law holding HDC-ABMT is not experimental (and is medically appropriate treatment for appropriate breast cancer patients, a position endorsed by the Florida Society of Clinical Oncologists and the Florida Division of the American Cancer Society).

However, Defendant succeeded once in leading a trial court into error. There would have been no guarantee Defendant could not again urge an erroneous analysis absent the Eleventh Circuit's statement on the law that Defendant's policy is ambiguous. As this case demonstrates, such errors can cause delays of many months, which many policyholders might not survive (the expedited appeal in this case took six months, and the total time from Mary Dahl-Eimers' original request for the

treatment through the conclusion of the appeal was eleven months).[9]

C. The Eleventh Circuit correctly declined to vacate its opinion on the controlling legal question.

Defendant's argument on this point again begins with an incorrect premise, because as discussed above, Mary Dahl-Eimers' case is not moot. Defendant states in the form of a fact (in its Statement of the Case at petition p. 12) that the Eleventh Circuit "concluded it was not obligated to follow the rationale of" *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Contrary to Defendant's suggestion that the Eleventh Circuit "concluded" it did not have to follow this Court's decisions, the Eleventh Circuit correctly concluded the rationale of *Munsingwear* did not apply in this case.

In *Munsingwear*, the United States filed a complaint seeking an injunction and damages for alleged violations of a regulation fixing the maximum price of a commodity

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[9] Although in federal court on diversity, Mary Dahl-Eimers recognizes Florida law does not control this issue. However, Florida law also would find this case not moot. In *Wons v. Public Health Trust of Dade County*, 500 So. 2d 679 (Fla. 3d DCA 1987), *affirmed*, 541 So. 2d 96 (Fla. 1989), the plaintiff opposed a blood transfusion for religious reasons. The trial court had ordered the transfusion which she had received by the time the appellate court considered the issue. The appellate court held (and the Supreme Court approved) that the case was not moot because the plaintiff "may well require blood transfusions in the future." 500 So. 2d at 684 (541 So. 2d at 97). As noted, Mary Dahl-Eimers need for the HDC-ABMT is much more certain.

which the respondents sold. The district court denied the claim for injunctive relief, finding the respondent had complied with the regulation. The court of appeals dismissed the appeal by the United States as moot when the commodity involved was decontrolled. This Court held the proper course of action in such a situation was to vacate the district court opinion, thereby allowing the parties to litigate the damages issue without the district court's earlier (unappealable) order standing as res judicata. This Court observed that this procedure "clears the path for future re-litigation of issues between the parties and eliminates a judgment, review of which was prevented through happenstance." 340 U.S. at 40.

As the Eleventh Circuit recognized, Mary Dahl-Eimers' case differs substantially. The Eleventh Circuit noted in its August 10, 1993 order, that the case was before the court on a controlling legal question under 28 U.S.C. § 1292(b) and the legal question has not changed.

Also, unlike *Munsingwear*, the parties here were not deprived of substantive appellate review by a change in the circumstances. In *Munsingwear*, the mootness occurred while the United States was seeking merits review of the denial of the injunction (the mootness denied it that review and would have subjected it to res judicata). Here, the parties enjoyed a full review of the merits of the certified question and received an opinion on the merits before the Defendant ever made a mootness argument.[10] As noted in the Statement of the Case,

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[10] Because the case remained pending in district court, the Defendant could have taken additional discovery during the appeal, as it did after it lost in the Eleventh Circuit.

contrary to its representation to the Eleventh Circuit to induce it not to issue the mandate, the Defendant never sought merits review from this Court.

Thus, this case is not like *Munsingwear* where a party was denied a review on the merits, and absent vacatur, the prevailing party below could seek a res judicata benefit. Here, the Defendant received a review on the merits and, after that review, attempted to use a mootness argument to persuade the Eleventh Circuit to vacate its decision on the question of law. Vacatur here would have frustrated, rather than furthered, the principles of *Munsingwear*.[11]

The district court's recent dismissal emphasizes the need for guidance from the Eleventh Circuit. The district court ignored Mary Dahl-Eimers' affidavit that she had active disease, and then held there was no justiciable issue when the Eleventh Circuit had held to the contrary on the same record (the affidavit was filed after the Eleventh Circuit's August order).

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[11] Defendant ignores that, if the case had been truly moot, under *Munsingwear* the district court's order would have been vacated so that it does not remain as a precedent. As noted above, Defendant never suggested that the district court order should also have been vacated. Defendant ignores this aspect of *Munsingwear* and the treatise Defendant cites. The treatise, in the same section Defendant cites with respect to a court of appeals vacating its judgment, addresses the appellate court's duty to vacate the district court's order. Petition p. 28; 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 426-429 (1984). As discussed herein, Mary Dahl-Eimers believes the Eleventh Circuit opinion was not moot, but it would clearly have been inappropriate to vacate that opinion without also vacating the erroneous district court opinion.

The district court then held there was no damage claim with respect to the prior denial for treatment at Moffitt and "restated" that it had previously found that a Phase 1 protocol is necessarily "experimental."[12] The district court had taken no further evidence on this point before it issued its ruling. Therefore, if Phase 1 protocols were experimental as a matter of law, the Eleventh Circuit would have so held in its opinion and the district court's finding is contrary to the mandate. The last sentence in the Eleventh Circuit's statement of the facts ("Background") noted the Defendant's argument that the particular combination of HDC-ABMT drugs proposed for Mary Dahl-Eimers was experimental, but obviously rejected that contention as a grounds for affirming the district court's opinion.

Thus, contrary to Defendant's Supplemental Brief, the only "clear error" the district court's September 21 order demonstrates is its own clear error in disregarding Mary Dahl-Eimers' September 14 affidavit and the Eleventh Circuit's opinion on the merits.

II. Mary Dahl-Eimers' case presents no jurisdictional question requiring exercise of this Court's supervisory powers.

Contrary to the representation at page 29 of the petition, the cited treatise does not say this Court often grants

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[12] The district court ignored that Mary Dahl-Eimers' claim for damages included the expenses from her fall, 1992, effort to obtain HDC-ABMT at the University of Alabama under a Phase 2 protocol.

certiorari to correct a court of appeals wrongful exercise of jurisdiction "especially when an appeal is rendered moot by change of circumstances." The treatise at the cited portion never mentions mootness or changed circumstances. Stern, Gressman, Shapiro, *Supreme Court Practice*, § 4.15 at 220 (B.N.A. 6th Ed. 1986).

Mary Dahl-Eimers' case was not moot for the reasons noted above. Her case presents a unique factual and legal situation for which the precise question appears never to have been addressed by a circuit court of appeal or this Court. As should be evident, there are numerous differences and disputes between Defendant's factual contentions and the facts presented by Mary Dahl-Eimers. Thus, this case does not present the typical situation where undisputed factual material is presented to this Court with respect to a mootness question. *See* Stern, et al., § 18.4 at p. 722. Mary Dahl-Eimers has attempted to identify the source for each of the facts she relies upon and stands ready to submit the referenced pleadings or other documentation to this Court at its request.

Mary Dahl-Eimers still suffers from Stage IV metastatic breast cancer for which her only hope for long-term, disease-free survival is HDC-ABMT. She can now proceed to fight for coverage with the guidance provided by the Eleventh Circuit's decision on a controlling question of law.

CONCLUSION

Mary Dahl-Eimers respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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October, 1993